

**Town of Milford
Zoning Board of Adjustment
May 17, 2012
Case #2012-08
Robert & Julie Anderson**

Present: Kevin Johnson, Chairman
Laura Horning
Len Harten, Alternate

Absent: Fletcher Seagroves
Steve Winder
Zach Tripp

Case # 2012-08 - The applicants, Robert and Julie Anderson, owners of Map 56, Lot 45-10, 150 Wallingford Rd., in the Residence "R" district, are requesting an equitable waiver of dimensional requirements from Article V, Section 5.04.5:B, for a shed constructed eleven (11) +/- feet from the side property line where fifteen (15) ft. is required, in accordance with Article X, Section 10.07.

THE MINUTES FROM MAY 17, 2012 WERE APPROVED ON AUG 16, 2012

Kevin Johnson, Chairman, opened the hearing by stating that the hearings are held in accordance with the Town of Milford Zoning Ordinance and the applicable New Hampshire statutes. He informed all of the members of the procedures of the Board. He read the notice of hearing into the record. The list of abutters was read. The applicants, Robert and Julie Johnson of 150 Wallingford Road, were present. K. Johnson informed the applicants that there are only three Board members present and they have the right to be heard by a full five-member board. If they choose to be heard by a three-member board, they are required to sign a waiver and cannot use that as grounds to appeal. The applicants asked if they were denied, they could appeal, but not because of there being only a three-member Board. K. Johnson said that is correct. If they were denied because of another issue, they can appeal on that. The applicants decided to proceed with the hearing before three members and signed the waiver.

K. Johnson asked the applicants to explain the reason for requesting an equitable waiver.

Julie Anderson stated that last year she requested a permit to build a shed and asked how far it needed to be from the property line. In error, she wrote down ten (10) feet and relayed that to her husband as her husband and a neighbor were preparing to have the shed built they put it at eleven (11) feet. It was not until the final inspection that they realized it had to be 15 feet from the property line.

K. Johnson asked the Board member if they had any questions.

L. Horning had none.

L. Harten asked the size of the shed, as there were two pictures in the application packet.

J. Anderson said it is ten (10) ft. by fourteen (14) ft.

K. Johnson said that information is on the application and the plan in the packet. It is the "Historical Colonial" shown in the packet.

There were no further questions from the Board

K. Johnson read the section of the Town of Milford zoning ordinance for an equitable waiver, Section 10.07.0: *All equitable waivers of dimensional requirements shall be governed by RSA 674:33-a (as amended), a copy of which is included in the Appendix.*

K. Johnson further read from a portion of the Appendix:

Section 674:33-a, Equitable Waiver of Dimensional Requirement. –

I. When a lot or other division of land, or structure thereupon is discovered to be in violation of a physical layout or dimensional requirement imposed by a zoning ordinance enacted pursuant to RSA 674:16, the zoning board of adjustment shall, upon application by and with the burden of proof on the property owner, grant an equitable waiver from the requirement, if and only if the board makes all of the following findings;

(a) That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value;

(b) That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or applicability made by a municipal official in the process of issuing a permit over which that official had authority;

(c) That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of the property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property; and

(d) That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.

II. In lieu of the findings required by the board under subparagraphs I(a) and (b), the owner may demonstrate to the satisfaction of the board that the violation has existed for 10 years or more, and that no enforcement action, including written notice of violation, has been commenced against the violation during that time by the municipality or any person directed affected.

K. Johnson stated that the above Section II was not applicable to this situation. The violation was not discovered until the structure was completed.

K. Johnson opened the hearing for public comment. There was none.

K. Johnson closed the public portion of the meeting.

K. Johnson then read from the e-mail received regarding this case, addressed to Shirley Wilson in the Office of Community Development, who is the person responsible for preparing the materials for the ZBA. The e-mail read "Dear Shirley Wilson, It has been brought to my attention by Robert Anderson (resident of 150 Wallingford Road) that an existing garden shed abutting my property (144 Wallingford Road) is in violation of a zoning ordinance. The shed is currently 11 feet from the property line and zoning regulations require a minimum of 15 feet. I accept the current location of the garden shed and support moving forward with the appeal process to gain town approval with the zoning board for the current location of Mr. Anderson's garden shed. Sincerely, Brian t. Bull, 144 Wallingford Road, Milford, NH."

K. Johnson noted that the abutter whose property is closest to the shed has written he has not objection. He commented this is a 10 x 14 shed, 140 SF. If it were 10 x 12, 120 SF, then it could be within six feet of the property line. It is very close. The town specifically intended to allow small sheds close to the line.

The Board then proceeded to consider the four criteria:

1. Was the violation not noticed or discovered until after the structure was substantially completed?

L. Harten – yes. He believed that was the case. The building inspector came out.

L. Horning – yes. She agreed. It is clear from applicants' testimony and by the chronological order of the evidence that the violation was not noticed until after the structure was in place.

K. Johnson – yes. He agreed. They put it in place and the error was noticed during the final inspection.

2. Was the violation not the outcome of ignorance of the law but caused by good faith error or has existed for ten years or more?

L. Harten – He didn't believe the violation was the outcome of ignorance. They came and applied for a permit. It was a misunderstanding as to the distance it needed to be located from the property line. It was a good faith error.

L. Horning – She believed it was a good faith error. Had the shed been a couple of feet smaller they would have been well away from the property setback requirement.

K. Johnson - agreed. It was not the outcome of ignorance of the law. They applied for a permit. They inquired and they were not trying to intentionally mislead the board. From the testimony and comments from the Office of Community Development they didn't believe they were just trying to do this, why would they set it back 11 feet?

3. Does the dimensional violation not constitute a public or private nuisance, diminish the value of other property or interfere with use of the property?

L. Harten – He didn't believe the location constitutes any public or private nuisance nor diminish the value of the abutting property. The letter from the abutter indicates he has no problem with it. It would not interfere with any future use of the property.

L. Horning – It does not constitute a public or private nuisance. It is a shed. It doesn't create a problem for the abutter. It would only enhance the abutting property.

K. Johnson – He saw no public or private nuisance from a shed, especially because a 120SF shed could be closer to the property line. It is a small difference. Since it is a well-built, properly-constructed,

inspected tool shed, it would not diminish the value of other property. It would not adversely affect future uses of the property of abutters' property.

4. Does the correction cost outweigh the public benefit to be gained?

L. Harten – yes. Any cost of having to move it would outweigh any benefit to the public. It is four feet. It would be inequitable to require them to move it.

L. Horning – agreed. She didn't see the need for any public interest where his shed is located within the 20 feet.

K. Johnson - agreed. He saw no public benefit to be gained by requiring to move the shed, particularly because the abutter doesn't object.

L. Harten commented that if you had a shed 15 feet from the property line, would that restrict the use of the property?

Applicant stated at 15 feet it would have been right in the driveway. The ramp comes to the driveway so the ramp would be in the driveway.

K. Johnson said he had thought about this when reviewing the case. One of the things that could be done in that situation is apply for a special exception saying because 15 feet would make the shed part of the driveway. He believed the Board would have granted that special exception. He thanked L. Harten for bringing it out. He said he was fairly comfortable granted an equitable waiver. He didn't see any public benefit for what it would cost to correct it.

K. Johnson then asked for a vote. He asked for any further questions from the Board. There were none.

K. Johnson then stated "After reviewing the petition and hearing all of the evidence and taking into consideration personal knowledge of the property in question this Board has determined the following findings of fact:"

1. That the violation was not noticed or discovered until after the structure was substantially completed:

L. Harten – yes

L. Horning – yes

K. Johnson – yes

1. That the violation was not the outcome of ignorance of the law but caused by good faith error or has existed for ten years or more?

L. Harten – yes

L. Horning – yes

K. Johnson – yes

3. That the physical or dimensional violation does not constitute a public or private nuisance, diminish the value of other property or interfere with use of the property?

L. Harten –yes

L. Horning –yes

K. Johnson –yes

4. Due to the degree of past construction does the correction cost outweigh the public benefit to be gained?

L. Horning – yes

L. Harten – yes

K. Johnson-yes

L. Harten made a motion to approve Case 2012-08

L. Horning seconded.

Final Vote:

L. Horning – yes

L. Harten- yes

K. Johnson –yes

K. Johnson informed the applicants they had been unanimously approved and reminded them of the 30-day appeal period.

K. Johnson then stated he had failed to read the application into the record, so he did so:

Section 1. Application for Equitable Waiver of Dimensional Requirements

An Equitable Waiver of dimensional requirements from Article 10 Section 10.07.0 of the Zoning Ordinance is requested to permit: The location of our shed to remain in its current location 11 feet from the property line, instead of the required 15 feet;

Facts supporting this request:

1. Explain how the violation was not noticed or discovered by any owners, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value: In April 2011 requested a permit to build shed on our property. Our understanding was the shed had to be 10 feet from property line. It was not discovered until the final inspection was done by the building inspector that we were in violation. We are 11 feet from property vs. the required 15 feet.

2. A. Explain how the violation was not an outcome of ignorance of the law or Ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner or owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner's agent or by an error in Ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority: It was an honest mistake. For some reason at the time we requested permit I wrote down shed had to be 10 feet from property line. So to be cautious we went out another foot to 11 feet. In good faith I made an error.

3. Explain how the physical or dimensional violation does not constitute a public or private nuisance, no diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future use of any such property: Shed has no impact on neighbor. A driveway and garage are between the house. There is no public/private nuisance and the location of the shed does not diminish the property value. We will maintain proper care of shed. Again the location will not affect accessibility to our septic system, propane tanks, etc.

4. Explain how, that due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected:

If variance were not granted it would be a large expense to move the shed. We are not aware of a public gain or benefit to moving shed. Again this was an innocent mistake on our part.